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In the Supreme Court of the United States

October Term, 1922.

No. [redacted]637

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

STANDARD OIL COMPANY (NEW JERSEY),
Respondent.

No. [redacted]638

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

GULF REFINING COMPANY,
Respondent.

No. [redacted]639

FEDERAL TRADE COMMISSION
Petitioner,

vs.

MALONEY OIL & MANUFACTURING COMPANY,
Respondent.

BRIEF FOR RESPONDENT, MALONEY OIL & MANUFACTURING COMPANY.

CHARLES D. CHAMBERLIN,
HUBERT B. FULLER,
Attorneys for Respondent,
Maloney Oil & Manufacturing Co.

In the Supreme Court of the United States

October Term, 1922.

No. 334
FEDERAL TRADE COMMISSION,
Petitioner,
vs.
STANDARD OIL COMPANY (NEW JERSEY),
Respondent.

No. 337
FEDERAL TRADE COMMISSION,
Petitioner,
vs.
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Respondent.

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Petitioner,
vs.
MALONEY OIL & MANUFACTURING COMPANY,
Respondent.

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BRIEF FOR RESPONDENT, MALONEY OIL & MANUFACTURING COMPANY.

To give attention to the eleven specifications of error relied upon by petitioner in its brief would unduly extend what we conceive to be the proper limits of this brief. We shall, therefore, confine discussion to what we believe to be the points of law applicable to the record for review by this proceeding.

The errors alleged to exist in the opinion of the court below, so far as reviewable in this Court, are comprised in the fifth error as alleged by petitioner in its brief, the substance of which is that the practice condemned by the order entered by the Commission and annulled by the Court is illegal and contrary to the provisions of the Federal Trade Commission Act and the Clayton Act, the first forbidding unfair methods of competition, the second forbidding tying contracts which the Commission concludes the practice in question to be.

THE FACTS.

The facts in the record are clearly and tersely stated by Judge Hough in *Standard Oil Co. vs. Federal Trade Commission*, 273 Fed. 478-9, which we adopt as follows:

> "(1) Petitioners produce and sell refined oil and gasoline, but are not engaged in the manufacture of oil pumps, storage tanks, and containers (hereinafter collectively called 'devices.')
>
> (2) They have been and are engaged in the leasing and loaning of devices, and they also maintain numerous storage stations for oil and gasoline in various states, which stations are replenished by shipments from petitioners' refineries, and the oil so stored is sold and delivered from said stations to retail dealers in the several states.
>
> (3) Each petitioner has leased and is now leasing, to retailers of its own gasoline, devices to be used by such retailers, and in so leasing petitioners have made and are now making contracts or leases with the retailers obtaining devices, under which any given retailer agrees to use his leased device solely for the purpose of storing and vending the product of whatever petitioner furnished him with the device.

(4) The rental or charge to such retailer for any petitioner's device is nominal, and does not afford a reasonable profit or return to the furnishing petitioner considering the value of a device, which petitioners procure by buying from manufac turers thereof.

(5) Petitioners have furnished and are furnishing devices to retailers only upon condition that each lessee uses his leased device only for the purpose of storing and selling therefrom the goods of the lessor.

(6) A majority of the retailers so leasing devices require in their business only a single device, though others may and do procure from each of several dealers in oil a leased device, and use them all, provided that each device is used only to facilitate the distribution of the lessor's product.

Upon the fact findings, substantially stated above, orders have been based, entered April 27, 1920, whereby each petitioner was required to 'forever cease and desist from (1) directly or indirectly leasing pumps or tanks, or both, and equipment for storing or handling petroleum products in furtherance of its petroleum business, at a rental which will not yield to it a reasonable profit on the cost of same after making due allowance for depreciation; (2) entering into contracts or agreements with dealers in its petroleum products or continuing to operate under any contract or agreement already entered into whereby such dealers agree or have an understanding that, as a consideration for the leasing to them of such pumps and tanks and their equipment, the same shall be used only for storing or handling the products of (the oil dealer proceeded against).'"

In upwards of twenty-five proceedings the stereotyped order of the Commission has been entered, the

validity of which has been reviewed and annulled by Circuit Courts of Appeals having jurisdiction to consider and modify, enforce or amend such orders in the Second, Third, Sixth and Seventh Circuits, reported in *Standard Oil Co. vs. Federal Trade Commission*, 273 Fed. 478, *Canfield Oil Co. vs. Federal Trade Commission*, 274 Fed. 571, *Sinclair Refining Company vs. Federal Trade Commission*, 276 Fed. 686 and *Standard Oil Co. vs. Federal Trade Commission*, 282 Fed. 81.

These opinions have been unanimous, except the last in which there is dissent in part. While the last named case is the only one under review in this proceeding, yet due to the consolidation of the records, the opinions in the other cases are at least persuasive in supporting the integrity of the conclusions herein.

POINTS CONSIDERED.

1. The practice of loaning or leasing pumps and tanks as provided in the contracts as stated is not an unfair method of competition forbidden by the Federal Trade Commission Act. (38 Statute 717, 719, Compiled Statutes Sec. 8836e).

2. Such contracts are not "tying contracts" forbidden by the Clayton Act, (38 Stat. 730, 731, Compiled Stat. Sec. 8835e).

3. The provisions of the contracts are entirely performed in intra and not in interstate commerce and are not under the jurisdiction of the Commission.

1. THE PRACTICE OF LOANING OR LEASING PUMPS AND TANKS AS PROVIDED IN THE CONTRACTS AS STATED IS NOT AN UNFAIR METHOD OF COMPETITION FORBIDDEN BY THE FEDERAL TRADE COMMISSION ACT.

The court below upon this point after citing what this Court said in *Federal Trade Commission vs. Gratz*, 253 U. S. 421-7:

> "The words 'unfair method of competition' are not defined by the statute, and their exact meaning is in dispute. It is for the courts, not the Commission, ultimately to determine, as matter of law, what they include. They are clearly inapplicable to practices never heretobefore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade."

finds as a matter of law that the only standard of legality is that established by the Sherman Act in the words "restraint of trade or commerce" and "monopolize, or attempt to monopolize" with reference to acts "which operate to the prejudice of the public interest by unduly restricting competition or unduly obstructing the due course of trade," and "restrict the common liberty to engage therein," citing:

> *Great Atlantic & Pacific Tea Co. vs. Cream of Wheat Co.* (D. C.) 224 Fed. 566, 573, affirmed 227 Fed. 46, 141 C. C. A. 594;
>
> *United States vs. American Tobacco Co.*, 221 U. S. 106, 179, 31 Sup. Ct. 632, 55 L. Ed. 663;

United States vs. Patten, 226 U. S. 525, 541, 33 Sup. Ct. 141, 57 L. Ed. 333, 44 L. R. A. (N. S.) 325.

Eastern States Lumber Asso. vs. United States, 234 U. S. 600, 613, 614, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788.

Standard Oil Case, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734;

Standard Fashion Co. vs. Magrane-Houston Co., 258 U. S. ——,42 Sup. Ct. 360, 66 L. Ed.——.

The court then says:

"Applying this standard to the trade practice here involved, the first question, that of unfair methods of competition, relates to the leasing of outfits without rentals.

"Is this phase of the practice oppressive upon competitors and does it tend to create a monopoly? Concededly, a lease of a curb pump outfit without rental gives a wholesaler a trade advantage over its competitors. This alone is not unlawful, for such advantage is the object of all competition, and is attained whenever one sells another goods of greater excellence or at lower prices than goods offered by others. Does this trade advantage contain the seeds of monopoly? It admittedly leaves competitors free to install competing outfits in the same locality and in all other localities. It also leaves every competitor free to place its outfit with the same retailer if it can prevail upon him by the ordinary competitive inducements of better goods, lower prices, and easier terms of credit. That the practice imposes upon a competitor the investment of more capital is an argument which would apply with equal force—and with equal infirmity—to competition based on superiority of goods and liberality of credit.

"Under the Federal Trade Commission Act declaring unfair methods of competition unlawful—as the Act stood before the passage of the Clayton Act—a loan of a curb pump outfit without return or a lease without rental did not, we think, tend to create a monopoly, and, accordingly, was not, in our opinion, an unfair method of competition."

The Circuit Court of Appeals for the Second Circuit in *Standard Oil Company vs. Federal Trade Commission*, 273 Fed. 478, on page 481 on this point said:

"We think this reasoning confounds commerce with convenience, besides introducing into trade an element of unfairness, and indeed dishonesty. There is no contract, agreement, or understanding by which any retailer is prevented from selling any brand of oil, and he can own or lease as many pumps as he likes or can use. It is unfair and dishonest to give out from a pump bearing one brand, another maker's oil, and all that secures any one retailer's trade for any one wholesaler is the amount of business the retailer can gather from the community.

"It is possible, when any system of distributing an article of prime necessity and enormous consumption is well established, that temptation arises for competing distributors to enter into treaties regulating prices, classifying customers, or dividing the area supplied into spheres of influence—one sphere for each distributor.

"It may be admitted that one function of the Trade Commission is to discern and suppress such practices in their beginning; but a thing exists from its beginning, and it is not a conclusion of law from any facts here found that a system which at present is keenly competitive, extremely advantageous to the public, and, in the opinion of a majority of the competent witnesses, economical, is at present unfair to any one or unfair because tending to monopoly. A tendency is an inference from proven

facts, and an inference from the facts as found by the Commission is a question of law for the court. As matter of law there is at present no violation of the Trade Commission statute; therefore, the first of respondent's contentions cannot be sustained.

For substantially the same reason the leases of these petitioners do not violate section 3 of the Clayton Act; i. e., the effect of their leases is not 'to substantially lessen competition or tend to create a monopoly in any line of Commerce.' We note *Coco-Cola Co. vs. Butler* (D. C.) 229 Fed. 224, as containing a valuable commentary on this section of the Clayton Act, and the facts of that case are suggestive of the advantages to the public in being reasonably able to rely upon getting the 'gas' he pays for out of any trade-marked pump."

In *Canfield Oil Co. vs. Federal Trade Commission, supra*, the court emphatically adopts the view above expressed. In *Sinclair Refining Co. vs. Federal Trade Commission*, 276 Fed. 686-7, the court says:

"Neither section relied upon gives the Federal Trade Commission power to regulate trade generally. The jurisdiction under section 5 exists only where there are practices that amount to a fraud in regard to some public or private right; otherwise they do not, in our opinion, as we said in the *Kinney-Rome* case *supra*, amount to an unfair method of competition.

In addition to the reasons upon which the decision was based in the *Texas Company* case *supra*, we are of opinion that petitioner had the undoubted right to furnish any and every purchaser such containers and conveniences to aid him in delivering the gasoline into the possession of the consumer as it might see fit, and at such cost as it might see fit. The right to fix prices is not given to the Federal Trade Commission. The only cases where the question of price has come into consideration have been

those wherein the making of a price—in some cases high, in others low—has been used as an element in some fraudulent scheme of oppression. The price which one may put upon that which he has to sell or lease is a matter wholly his own. *United States vs. Freight Ass'n.*, 166 U. S. 290, 320, 17 Sup. Ct. 540, 41 L. Ed. 1007; *Sears Roebuck & Co. vs. Federal Trade Com.*, 258 Fed. 307, 312, 169 C. C. A. 323, 6 A. L. R. 358. * * *"

There is no finding, and no evidence to support a finding of fraud or misrepresentation, the usual basis of unfair competition. This phase is fully discussed with ample authorities in *Kinney-Rome Co. vs. Federal Trade Commission*, 275 Fed. 665, defining "unfair methods of competition" in which the court concludes that this phrase must be considered in legal effect the same as "unfair competition" and "unfair trade" repeatedly considered by the federal and state courts. At page 668 the court says:

> "We conclude, from the discussion of the term 'unfair competition' by the courts, and we are of opinion, that there must be some fraud in trade that injures a competitor, or lessens competition, before it can be said that there has been used an 'unfair method of competition.'"

2. SUCH CONTRACTS ARE NOT "TYING CONTRACTS" FORBIDDEN BY THE CLAYTON ACT.

This phase of the case involves the question of the violation of the provisions of the Clayton Act. At page 83 in *Standard Oil Co. vs. Federal Trade Commission*, 282 Fed. 81, the court below paraphrases the contract under consideration as follows:

> "The form of contract used by the Standard Oil Company is identical in substance with contracts used by the other petitioners. Paraphrased, it is as follows:

Reciting by preamble that the retailer is now purchasing gasoline from the wholesaler for sale to its customers and has requested it to install on his premises equipment for the better storage and handling of the gasoline so purchased, and that in compliance with his request the wholesaler is about to make the installation, it is agreed between them that the 'equipment shall be used solely for the storage and handling of motor gasoline purchased by the' retailer from the wholesaler. Then follow undertakings by the retailer that he will maintain the equipment in good condition at his own cost; that he will not encumber or remove it or permit it to be seized or taken in execution; and that he will indemnify the wholesaler from liability for injuries occasioned by leakage, fire, or explosion of gasoline. The contract concludes with four provisions for its termination. First, upon the use of the equipment by the retailer for any other purpose than the storage and handling of gasoline purchased from the wholesaler; second, upon the retailer's failure for thirty days to purchase gasoline from the wholesaler; third, upon the sale of the premises by the retailer, and fourth, by either party upon five days' notice in writing to the other party, with the right of the wholesaler in any event to enter upon the premises and remove the equipment.

Having stated what the contract requires the retailer to do, the things which it does not require of him are equally important. The first is he is not required to pay any license fee, rental or other thing for the use of the equipment; nor is he restricted in his business to the equipment covered by the contract. On the contrary, he may use other equipment leased by competing wholesalers, or purchased by himself. Nor does the contract expressly tie him to the wholesaler's products. He may freely deal in gasoline or other petroleum products purchased from competing wholesalers.

He may not, however, use the equipment of the contract for storing and handling a competitor's gasoline."

The court then considers and carefully distinguishes the cases decided by this Court recently, holding that certain contracts offend against the provisions of the Clayton Act, from the cases at bar. These cases distinguished are the *United Shoe Machinery Corporation vs. United States*, 42 Sup. Ct. 363, and *Standard Fashion Co. vs. Magrane-Houston Co.*, 42 Sup. Ct. 360. The distinction is sound. In the latter case this Court explains section 3 of the Clayton Act as follows:

> "Section 3 condemns sales or agreements where the effect of such sale or contract of sale 'may' be to substantially lessen competition or tend to create monopoly. It thus deals with consequences to follow the making of the restrictive covenant limiting the right of the purchaser to deal in the goods of the seller only. But we do not think that the purpose in using the word 'may' was to prohibit the mere possibility of the consequences described. It was intended to prevent such agreements as would, under the circumstances disclosed, probably lessen competition, or create an actual tendency to monopoly. That it was not intended to reach every remote lessening of competition is shown in the requirement that such lessening must be substantial."

In view of the number of orders issued against the numerous respondents in these related proceedings it is a strain upon the imagination to conceive that there is even a possibility of monopoly and competition exists only by some restraint of trade.

The court in the Second Circuit Court of Appeals in 273 Fed. 481-2 also comments upon this point as stated in Point 1.

The court in the Sixth Circuit tersely conclude after commending the finding of the Second Circuit, follows:

> "It necessarily follows that for this reason t acts complained of do not violate either the Tra Commission Act or section 3 of the Clayton Act.

From the Sixth Circuit in the *Sinclair Refini Company* case (276 Fed. 688) we quote the following:

> "We are of opinion that there was no viol tion of section 3 of the Clayton Act. The complai under that section is that petitioner made leases f the container and pump and fixed the price ther for 'on the condition, understanding, and agre ment that the lessees thereof shall not purchase deal in the products of a competitor or competitor of respondent' (petitioner). There is nothing i the evidence nor in the findings of fact by th Federal Trade Commission that supports any suc charge. The finding is that there was a unifor contract. There is no word there about purchasin from competitors. The only limitation is that—
>
> > 'The above-described equipment shall be use by party of the second part for the sole purpos of storing and handling the gasoline supplied b party of the first part.'"

The comment of the court below upon this phase the case is so true to the facts that it can hardly b bettered. At 282 Fed. 89 it reads:

> "Many retailers buy and own curb pump out fits. With these we have nothing to do except t note that by the practice of leasing outfits, compe tition with them is greatly increased. We are con cerned only with the retailer who has not mone enough to purchase an outfit, or, having money, doe not care to risk it. What happens? If his localit promises trade, one of the many wholesalers wi

supply him with an outfit without cost and without risk to him. The only condition imposed is that he shall not store and deliver through the outfit gasoline of any other wholesaler. The tying element in the transaction, if any there be, is the one arising from human nature and business sense, namely: that the retailer will install no other outfit so long as he is satisfied with the quality and price of the wholesaler's gasoline, and so long as one outfit serves his trade. The contract leaves him perfectly free to deal in all petroleum products made by competing wholesalers. He is at liberty to install, by lease or purchase, as many other outfits as he may choose and to sell through them as many brands of gasoline as he may desire. The leasing contract, being terminable by him at will on brief notice, permits him to change outfits at will, replacing one by another as often in the course of wholesalers' competition as he is induced to do so. The retailer, regarded in the aggregate, is an actor in the practice, who by reason of his number, place and interest, causes competition between wholesalers to be increased rather than lessened. If the practice is abridged or abolished the retailer's risk is increased and his number diminished, and correspondingly, competition is lessened. Certainly the retailer's part in the practice violates neither of the statutes. Nor, for the reasons given, can we think he is monopolized by the wholesaler, or the territory in which many retailers do business under the practice is monopolized."

The entire purpose in the contracts is to preserve the "device" loaned for the sale of the products furnished by the lessor preventing deceit in that regard by the lessee, which if done, would be the very essence of unfair trade. This Court in *Howe Scale Co. vs. Wyckoff, Seamans & Benedict*, 198 U. S. 118, at page 140 said:

> "The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another."

If the lessee desires to buy and sell the products of a competitor, nothing in the contract prevents, only he must use some other "device" than that owned by the lessor. As a practical matter the "one pump" dealer may prefer not to change, but this is because of his business sense and not because he cannot do so. Fair treatment or excellence of goods may likewise hold the trade of a "one pump" dealer, who owns his own pump, more potently than the lease agreement.

From the nature of the gasoline distributing business and the large number of competitors the distributor under the lease agreement comes very close to being the agent of the wholesaler providing in part the means of distribution and the contract could easily be converted to one of agency without disturbing the flow of business. There would then be a similitude to the case of *Federal Trade Commission vs. Curtis Publishing Co.* Adv. Opinions, Feb. 1, 1923, pages 231-235. At page 235 the court said:

> "Effective competition requires that traders have large freedom of action when conducting their own affairs. Success alone does not show reprehensible methods, although it may increase or render insuperable the difficulties which rivals must face. The mere selection of competent, successful and exclusive representatives in the orderly course of development can give no just cause for complaint, and, when standing alone, certainly affords no ground for condemnation under the statute."

3. THE PROVISIONS OF THE CONTRACTS ARE ENTIRELY PERFORMED IN INTRA AND NOT IN INTERSTATE COMMERCE AND ARE NOT UNDER THE JURISDICTION OF THE COMMISSION.

The contracts condemned as unfair and forbidden by both the Acts above are necessarily made for local distribution. That is what a curb pump is for. Whether it or the products have come from beyond state borders both must have come to rest and terminated any and all interstate commerce before the dispensing under the provisions of the contract can begin.

The court in the Second Circuit said, 273 Fed. at page 482:

> "It is, of course, true that if the trade or business under consideration is not interstate commerce the Commission had no jurisdiction."

That question was not pressed in that proceeding. However, in the Sixth Circuit it was pressed, and at page 574, (274 Fed.) the court said:

> "It would therefore appear that this order of the Federal Trade Commission to cease and desist is based upon the theory that the petitioners in the marketing of gasoline and other oil products are engaged in interstate commerce. In view of the uncontradicted evidence and the stipulations and agreements of the parties hereinbefore referred to, this theory is not tenable. On the contrary, this evidence and the agreements of the parties in reference to the facts affirmatively show that the sales business of the petitioners is purely and wholly intrastate. *Bowman*, Atty. Gen. *vs. Continental Oil Co.*, 255 U. S. ——, 41 Sup. Ct. 606, 65 L. Ed.——, decided by the United States Supreme Court June 6, 1921."

After commenting upon the cases relied upon b counsel for the Commission, the court concludes:

> "The findings made by the commission in the cases do not show such an extraordinary conditio of affairs, or any such direct burden, hindrance, discrimination against interstate traffic, as woul call for the exercise of federal control over purel intrastate business. Nor is there any evidence i this record that would authorize such a findin Especially is this true in view of the conclusion w have reached in this case that the practice com plained of is at present not only conducive t competition, but extremely advantageous to th public. *Federal Trade Commission vs. Gratz et al* 258 Fed. 314, 169 C. C. A. 330, 11 A. L. R. 793; *Fe eral Trade Commission vs. Gratz*, 253 U. S. 421, 4 Sup. Ct. 572, 64 L. Ed. 993."

CONCLUSION.

1. There is no charge or evidence of what th courts have heretofore held to be "unfair trade" o "unfair methods of competition" as opposed to goo morals because characterized by deception, bad faith fraud or oppression or as against public policy, becaus of their dangerous tendency to create a monopoly *Federal Trade Commission vs. Gratz*, 253 U. S. 421-42 40 Sup. Ct. 572, 575.

2. The practice and the contracts condemned b the Commission applied only to the equipment fur nished and owned to the lessor to protect the trade nam of the owner under which it was sold which is the ver essence of fair trade. *Denison Mfg. Co. vs. Thoma Mfg. Co.*, 94 Fed. 651.

3. The lease agreement was the most practicable way in which the enormous expansion of public demand

for service could be met, and was almost simultaneously adopted over a large area by a large number of competitors and was open to all. It was not more restrictive than other multitudinous ways and devices to secure trade in competition and met a real demand of the public.

The restriction applicable to the pump and tank furnished by the purveyor did not prevent the dealing in the goods of competitors except by means of the instruments furnished for purveying the owners' goods and maintaining their integrity. *Homer Scale Co. vs. Wyckoff, Seamans & Benedict*, 198 U. S. 118-140; *Coats vs. Merrick Thread Co.*, 149 U. S. 562.

4. There is no such thing as a "germ" of monopoly. The two concepts are incompatible. The court will not indulge in speculation. *United States vs. Transcontinental Freight Association*, 58 Fed. 58. *United States Chemical Co. vs. Provident Chemical Co.*, 64 Fed. 946-950. *Standard Fashion Co. vs. Magrane-Houston Co.*, 42 Sup. Ct. 360.

5. The lease of equipment was necessarily of local application and did not involve interstate commerce and was beyond the jurisdiction of the Commission.

Hammer vs. Dagenhart, 247 U. S. 251;
Pensacola Telegraph Co. vs. Western Union Telegraph Co., 99 U. S. 1;
Bryan vs. Bowser, 209 S. W. 189.

6. Uniformity of the decisions of four Circuit Courts of Appeals upon the same orders of the Commission upon practically the same records by applying determined legal principles weigh strongly in favor of respondents herein. Should the court below be reversed

this respondent would be deprived of the right of the same freedom of contract available to others, to reach which condition further action by the Commission would be necessary.

If the Commission by new orders in the several Judicial Circuits succeed in preventing the practices they have condemned it will be at the expense and inconvenience of the public, as the court below has well said (282 Fed. 81-89).

This respondent therefore most respectfully submits that the decree of the lower court should be affirmed.

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Cleveland, Ohio,
February 24, 1923.

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IN THE

Supreme Court of the United States

638

NO. ~~300~~ OCTOBER TERM, 1922.

FEDERAL TRADE COMMISSION, Petitioner,

vs.

GULF REFINING COMPANY, Respondent.

BRIEF AND ARGUMENT FOR RESPONDENT, GULF REFINING COMPANY.

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IN THE

Supreme Court of the United States

NO. 320 OCTOBER TERM, 1922.

FEDERAL TRADE COMMISSION, Petitioner,

vs.

GULF REFINING COMPANY, Respondent.

Brief and Argument for Respondent, Gulf Refining Company.

The purpose of this brief is to supplement respondent's petition for review of the order of the Federal Trade Commission to the United States Circuit Court of Appeals, which is a part of the record. In this petition, specific objections were made to the several paragraphs of the order. There is substantially no controverted issue of fact in the case. The conclusions from uncontradicted evidence are alone excepted to. There will be no occasion to restate these exceptions, as their merits or demerits will be apparent from a reading of the petition.

The respondent has also in its petition attacked the constitutionality of so much of the Federal Trade Commission Law as authorizes action based upon "unfair competition." While the views of the attorneys for the

respondent will not permit the abandonment of these propositions, it is apparent that present further discussion of this question will not be profitable.

The proposition has also been made that the business, the methods of which are complained of, is not interstate business. The applicable law as developed by the adjudicated cases is exceedingly complex. A review of them would tend rather to bring confusion to the simple facts with which the court will deal, and further their discussion is pretermitted.

The Facts As to Respondent, Gulf Refining Company.

With reference to this respondent the evidence shows the following facts:

The concern of which the Gulf Refining Company is a part (hereafter referred to as the "Gulf Company") is engaged in the production of crude petroleum in the several American states and in foreign countries. It is engaged in refining in the State of Texas. It sells petroleum and petroleum products in the Atlantic and the Southern and Southeastern States. In a number of states it has distributing stations and service stations and is engaged in the wholesale and retail business of selling gasoline and other petroleum products. In all of its trade territory it is engaged in active competition with like dealers—having in most instances established its business after its strongest and most active competitors. In addition to stations which it owns and which are operated by its employes, it has made arrangements with a large number of persons by which pumps and tanks and other appliances owned by it are installed, its products being sold to such per-

sons at a price below the retail price and the compensation to these persons being the resulting profit.

In some cases these arrangements are with persons who are already dealers, but in most cases the business is initiated by the company. The Gulf Company is not a manufacturer of these pumps and appliances. It buys them in the open market and at the best price obtainable. It is not, as held by the Federal Trade Commission, engaged in competition with the manufacturers and dealers in making sales and leases of pumps, etc. The purchase by the company of the appliances and the disposition of them is purely and entirely incidental to its business of selling gasoline and other petroleum products. In its own service stations the same appliances, bought in the same way, are used for the same purposes. In leasing them at a nominal rental to persons who handle their products the company assumes that the best and most economical and efficient arrangement possible has been made for the disposition of their products to the public. It is not engaged in the pump selling business, and it buys pumps not to sell but to use in the conduct of its gasoline selling business. It does not stipulate that the dealer shall not sell the products of other concerns, but it does require that its own appliances shall not be used in aiding its competitors. The Federal Trade Commission holds that "the nominal rentals do not afford a reasonable profit to respondent on the amount invested in such devices." The company's profits on the "devices" so leased are the same as those on which it installs in its own stations. On these, as on its refinery building, its pipe lines, its tank cars, there are no direct profits but only that return which comes from the general conduct of a business of which they are necessary parts.

The Proper Application of the Law.

The law should be so construed and applied as to prevent the evils of monopoly without destroying enterprise and initiative.

The interstate business of the country is so tied up with the intrastate business that effective regulation of the former necessarily controls substantially all of the latter. That part of the commerce of the country then which is transportation is under domination of the Interstate Commerce Commission and the Courts, and the remainder of the commerce is under control of the Federal Trade Commission and the Courts. If the activities of these agencies of the Government are confined to the enforcement of definite laws forbidding or authorizing the conduct of business in indicated ways, it will be practicable for the business of the country to be adjusted to the new condition of all pervasive prohibition and regulation. But unless a liberal policy is pursued in construing and applying the law, business must be conducted without the possibility of ascertaining the limitations to which it is to be subjected. Investments must be made, if made, without means being provided of determining whether the contemplated business will meet the approval of those to whom the business morals and business methods have been intrusted.

Under the law business must be so organized and conducted as not to monopolize commerce "or any part" thereof; this is modified by the "rule of reason" which makes business possible but which nevertheless gives to the law the diversity and uncertainty which comes from the existence of many men of many minds.

The laws against monopoly are based upon the assumption of the merits of competition. Apparently

the Trade Commission conceives the competition must be of that enaemic kind that will not permit its being characterized as "unfair." There must be no monopoly which destroys competition and no competition which destroys monopoly. The law-maker finds himself unable to be more definite than is expressed in the admonition "Be Good," and the business man, unable to determine what this means to those who overlooks his affairs, can regulate his conduct by no safer motto than "Be Careful."

If these uncertainties can no longer be used as the basis of an attack on the validity of the law they should at least be considered by the courts in applying its provision to the developing business of America. Indeed this court has already made additions to or clarifications of the law. It has already said in substance that the method of competition in order to be "unfair" must be essentially dishonest, oppressive or in violation of some law. It is not probable that the business of the country will ever be conducted on the basis that would meet the lofty ideals of the man of Nazareth,—at least until the time shall have arrived when courts and commissions may be dispensed with as unnecessary. Keeping business from a competitor or taking business from a competitor would not accord entirely with these ideals, yet coming to terms with a competitor is in conflict with what is regarded as public policy. Great material progress has been made under a system which give a little margin to the aggressor in business. Moreover, the man who has no business and wants to acquire it has been permitted to use methods which do not meet the approval of the man who has business and wants to keep it. Under this aggressive system of competition America has been built, millions of acres of land have been put in cultivation, great cities have arisen, great factories have been erected, great railroad systems have

been developed,—the country has become the most prosperous in the world.

There was certainly no intention on the part of Congress to put the business of the country on an entirely different basis from that which has always served—for America and the balance of the world. The dividing line between business enterprise and cognizable misrepresentation has not been well defined. There has been an allowable lack of conservatism in describing the wares offered for sale. The land agent has been permitted to be liberal in describing the fertility of the soil and the salubrity of the climate. The automobile agent is expected to undertake to impress his prospect with the superiority of his machine. Wool garments have the needed amount of cotton. The smallest fruit gravitate to the bottom of the basket. Railroads print maps which show their lines straight. Lawyers earnestly urge the controlling merits of the cases they cite and deprecate the cases adverse. Refineries take the same crude petroleum, refine by the same processes, and each secures a gasoline superior to any of the others. Exaggeration even enters into public life, and even in appointments to judicial office one may have merits ascribed to him which no less please than astonish him. Exaggeration is the soul of competition.

These things have been and will be. It was not the purpose of the Federal Trade Commission Act to abolish the practices of the centuries, to legislate a great moral reform. While legislation does not these days shrink from an effort to change the morals of individuals, there is nothing in this legislation to indicate a design so ambitious. The seller may still do something and say something; and the buyer would still better beware.

It was not the purpose to legislate morality—to discourage effort—to suppress enterprise—to insure the

purchaser against the effects of his lack of care. It was very evidently a part of the general policy which has its inception with the passage of the Sherman Act to prevent the ills which were supposed to inure in monopolistic control. The policy was based upon the assumption that economic ills would be prevented or cured by competition. The results of this policy have not entirely justified the faith of its proponents, and governmental control of some utilities has taken its place. It is even assumed that competition may sometimes be harmful to the public and that even so standard a device of competition as the lowering of prices may have an injurious effect. Even sometimes the construction of competitive railroads are discouraged and a policy has now been entered upon which if it had always obtained would probably have confined the development of America to a narrow Atlantic strip.

Up to this time, however, the policy of repressive conservatism has been applied alone to those enterprises and industries which are affected with a public use. If the essential indefiniteness of this term has permitted the classification of business not primarily so regarded as public utilities still the great mass of the manufacturing, agricultural and mercantile business of the country has been subject alone to the recognized economic and business rule, the general principle of jurisprudence and the specific rules of criminal law found necessary to prevent abuses. If, however, the views which the Trade Commission entertains as to the purpose of its creation and the power given it obtain, all the business of the country not already under commission control will be taken over for revision and regulation by an extra-constitutional body, the proper exercise of whose functions would imply transcendent business ability, super-knowledge of affairs, rare legal training and discriminating capacity for determining heretofore neglected questions of conscience.

It is respectfully insisted that no such effect was intended. In the formation of trusts, in the amalgamations of great businesses, in the advantageous use of the great prosperity untrammeled business activity had brought to the country, practices had grown up and conditions had resulted of which it had become necessary that the law take cognizance. It had also been ascertained by an effort to practically apply the existing laws, that it frequently became detrimental to the public interests to disturb conditions that had grown up in violation of the law. An effort was made in the passage of the Trade Commission Act to give to the courts expert aid in so shaping its judgments that the minimum of destructive disturbance would result, and to give to business interests of the country protective advice that would prevent violation of laws difficult to understand and apply. There was no purpose to establish a moral censorship, and thus make laws for practical business as diverse as the consolidate conscience of an ever-changing commission.

It must be admitted that this court has not gone as far as this argument would require in limiting the functions of the Commission, but it has placed some restrictions on its exercise of power, and in substituting a judicial conception of "unfair competition" for that of the Commission has added that to the law which makes it measurably capable of comprehension and administration.

The Methods of Respondent Do Not Constitute "Unfair Competition."

Under the views of this Court expressed in *Federal Trade Commission vs. Gratz*, 253 U. S., 421, a method of competition must in order to be "unfair" be

(1) Opposed to good morals as established by recognized standard, because involving
  (a) deception,
  (b) bad faith,
  (c) fraud, or
  (d) oppression.

It is respectfully submitted that the trade practices under consideration involve no one of these elements.

The Gulf Refining Company is a part of an oil organization which produces crude petroleum, refines it, and sells the refined product. This organization has no affiliations of any kind which limits the place or amount of its product, its refining activities, or the places or conditions of its sales. It is in active competition with every other oil concern doing business in America. It produces petroleum as cheaply as it can, buys petroleum as advantageously as possible, transports it as cheaply as it may be done legally, refines it as well and as economically as the conditions of the art permits, and sells the residue and the refined product with as much profit as it can legitimately make. It is purely a business organization which obeys the laws of the countries in which it operates because it is right, and obeys the natural and economic laws because they cannot be escaped or evaded.

In its rapidly expanding business, built up entirely under competitive conditions, it has gone into places where the public was already served—indeed it has

rarely been able to find entirely virgin territory. In order to secure business it has usually been compelled to take business that had theretofore been done by somebody else. The taking of this business cost it something and cost its competitor something. All this expense—of itself and of its competitor—has doubtless usually been passed on to the public for payment. Certainly unless the expenses of competition could be borne by the public competition would not be possible. But it is assumed that the advantages to the public more than counterbalance that which it pays for duplication of the cost of service. This is the basis for all the anti-monopoly legislation,—and doubtless this legislation must be made effective, or the field of price-fixing enlarged. At all events the Gulf concern adjusts itself to the law and the conditions which it finds as it undertakes to expand, and practically everywhere it has gone it has furnished or met competition. If in this competition nothing is done except that which secures the approval of a competitor nothing will be done which will benefit the public. It may be necessary to secure the services of a good man. To secure him may involve giving him more than someone else is giving, and thus depriving a competitor of a good employe. It may be necessary to cut the price—thus preventing a competitor from getting what his product is worth. It may be necessary to establish a station more convenient than that of the competitor—thus subjecting him to loss, or requiring him to make expenditures he would not otherwise incur. It may be necessary to establish a more attractive station, give free air service, be liberal in the matter of credit—all of which imposes a burden on the man already established which he would like to escape, and which may impose an increased expense on the industry which the public would like to escape. But these are incidents of competition—these or the like

must be indulged in if there is in fact competition. If the newcomer undertaking to establish himself should make untrue and dishonest statements concerning the wares of his opponent, and make with regard to his own wares statements affirmatively false and not merely the permissible expression of business enthusiasm or enterprise the competition could be classified as "unfair."

In establishing competition the Gulf concern has confined itself to securing employees of activity and courtesy, to furnishing a superior and uniform product, to establishing convenient and attractive stations, to installing safe and easily used appliances. No other ways are open that do not involve violation of good business principles or good morals. But within these lines it regards itself as having the right to go as far as it may choose.

The suggestion is made that one of its competitors manufactures the appliances which it uses in the way criticised by the Commission. The Gulf does not conceive that this circumstance in any way affects the question of unfair competition between it and other oil concerns. The Gulf certainly cannot be said to be in "unfair competition" with any maker of pumps or tanks. All the pumps and tanks that it uses are purchased in the open market. It pays the prices fixed by the manufacturers. The sellers know the purposes for which the purchases are made—the manner in which they are to be used. The sales are not compulsory. When the Gulf buys these "devices" it is without restriction as to use, and it feels that it has the right to use them and it does in fact use them in the manner which seems best calculated to improve its position as a competitor with the other concerns engaged in the oil business in the territory in which it has been able to establish itself.

The general policy of the Gulf company is to establish its own stations and sell its products directly to the consumer. This policy is not adhered to when it results to the detriment of the primary purpose of the business,—the production and sale of petroleum and its products at a profit. At some places the conditions may not justify a fully equipped station with the necessary employees. The expense might be out of proportion to any possible profit. There are other places where the amount of business might justify a station, but where the business is already controlled by someone whose hold it would be difficult to disturb. Sometimes it may be this dealer can be persuaded to become the agent of the company. In such case the Gulf Company may install its pump and tank and give a convenient, clean and safe service with appliances which it has bought upon the open market and which it owns and which it may do with as it pleases, even to the point of benefiting the public and itself.

Instead of securing the services of the man already in business it may be that the Gulf may conclude that the best arrangement that may be made is to sell its products to him. It may be that he is unable or unwilling to install the Gulf appliances. If these should be sold to him at the cost to the Gulf it may mean an investment not warranted by his business. It may be that the appliances of a Gulf competitor is already installed and the local dealer can see no advantage to himself in substantially duplicating that which he has. But the Gulf can see an advantage to itself in getting the pumps and tanks installed. The installation will enable it to get its products before consumers who have heretofore not known of their merits. The contract will provide that these appliances may not be used except for Gulf products. This will reasonably insure that the public will get Gulf products and not

products lacking their merits. In doing this it has violated no right of the local dealer. It has not violated any right of the public; on the contrary it has given the public an enlarged choice of petroleum products, and has insured that it will be furnished quickly, conveniently and safely. It has violated no law; on the contrary it has extended and made effective the competition which the law encourages. Doubtless it would have been more profitable and generally advantageous to the company if the established dealer could have been employed as an exclusive agent. In such case, no question would have arisen as to the legality of the act (*Federal Trade Commission vs. Curtis Publishing Co.* S. C.) It is difficult to conjecture how a qutstion could have arisen with reference to an act that in its essence is the same, except that it preserves the independence of the dealer and enables him to continue to enjoy the benefits which competition among wholesale sellers of gasoline brings to him—which benefits he may divide with his public if he chooses.

It is urged that the ability of some companies to furnish pumps and other appliances puts at a disadvantage dealers who are without sufficient capital to pursue a like policy. The objection would be just as valid against the direct use by the larger companies of expensive sale appliances, or of the acquisition by them of desirable but expensive locations for stations, or the construction of attractive and convenient stations, or putting up attractive signs or indulging in other expensive advertising, or the paying of high wages to men who demonstrate extraordinary capacity for salesmanship. The objections could be extended to the erection of large refineries, to the installation of long pipe lines, and to the acquisition of high-priced producing properties. The larger companies have advantages in each of these particulars over companies

not so adequately financed or not so fortunately equipped. Every oil concern has the advantages which its properties and its organization gives it, and most of them must meet the competition both of those with more capital and with those of less, both with those of better organization and those of less efficient. But it is an actual and an efficient competition which has grown up under the protection of the law. It is a competition that is beneficial to the public. The growth in the demand for gasoline is perhaps without precedent. By the bold and efficient use of capital the needed petroleum has been secured, the necessary pipe lines have been laid, the great refineries have been erected, the efficient and safe distributing systems have been developed. Rarely has so stupendous a thing been so quickly and so efficiently done. This has been under laws that have not permitted monopoly and which have interfered when monopoly has threatened. Any infraction can be punished, as infractions have been punished. But under these laws ample freedom was allowed. If now the freedom of initiative and action is to be superseded by bureaucratic control, if the conduct of the business is to pass from the hands of experts who have demonstrated their capacity to those of men unfamiliar with this business and not eminent in any, doubt may reasonably be entertained if this industry still under the strain of an unprecedented growth can meet the problem immediately ahead.

The Interdicted Practice Has No Tendency to Monopoly.

The dissenting opinion of Judge Morris of the Circuit Court of Appeals puts as strongly as may be the argument that the practice under consideration has a tendency to create a monopoly.

Respondent has no disposition to question the established principle that in passing upon the questions here involved the actual conditions under which a contract operates and the effects will rather be considered than its mere verbal terms. It is, of course, assumed by the sellers of petroleum that the installation of its "devices" will have some effect in influencing the person to whom it has delivered them. If there was no such effect the company would doubtless be without any sufficient business reason for supplying these convenient and safe devices for the benefit of the public. It is also doubtless the case that in most instances one set of "devices" is all that the retail dealer requires to furnish gasoline to the public. This argument can be indefinitely extended and applied. One dealer for the community may be enough. One refinery for the nation may be enough. Possibly economies might be effected by this concentration and cheaper gasoline might be possible.

But the system which the law undertakes to maintain is not concentration and monopoly, but competition, and competition has been promoted by the system under attack. The dealer who has installed the devices of one company may also secure those of another company if the amount of his business and the way in which he handles it suggests to the second company that an arrangement with him is better than one with some other dealer or person in the community and better

than the establishment of a service station owned by the company. Under the terms of his contract the dealer has a right to put in other "devices." He may choose to do it to procure for himself the benefit of relations with more than one company, or to meet the demands of the public for more than one brand of gasoline. He has unrestricted right and power of action, the companies have unrestricted right and power of action and the public has unrestricted right and power of action.

As heretofore suggested the installation of "devices" will not be without effect. Everything done in competition has its effect, or it fails in its purpose. But the effect is not improper or illegal. If instead of making a contract of the kind under consideration a company installs its own station it is manifest that this would have a much more definite and conclusive effect. All improvement in quality of a product, all efficiency in its handling, all extraordinary courtesy in employees, all advertising makes for increase in the volume of business—for concentration—for monopoly—for increasing the difficulty of a competitor in entering the field—for decreasing the number of competitors who undertake to enter. The establishment of a station of any kind by one company would not be without effect in the determination by another company of whether it would establish a second. The purpose of all competitors is to secure sales that would otherwise go to somebody else, and monopoly may be the result of thoroughly effective competition.

The business methods discussed do not come under the ban of the law, but are encouraged by it; the practices under consideration herein are not without effect, but they are effects which inure to the benefit of the public without being unlawful or unethical.

In a series of paragraphs in its brief the Trade

Commission undertakes to establish that the public convenience could just as well be subserved by the "devices" if the dealers were not required to confine their use to the products of the owner. It is scarcely necessary to argue that the appliances would be useful and beneficial whether one brand of gasoline or another was handled through them. It does not however follow that as many of these "devices" would be available to the public as under the present conditions. There has never, at any time, been anything to prevent a dealer from purchasing outright "devices" as efficient as those he may now lease,—if he has the business to justify their installation and the money with which to pay for them. But it is very safe to say that many "devices" have been installed that would not have been except for the aggressiveness of the larger companies amply able to finance their campaigns of competition.

The actual effect upon competition is indicated even by the brief of the Commission, which says "There is considerable evidence in the record showing that in some localities more installations are being made than are required, either for public convenience or for economical distribution by wholesale marketers." The brief further suggests "any installation beyond this (that is enough to meet the convenience of the public) will not only not result in benefit to the public but will tend to impose undue burdens upon consumers." With this statement that competition has been and is very active respondent will have to agree but it is not ready to join in the attack made by the Commission upon the law,—for whatever may be the demerits of competition as an economical system it is perhaps not as objectionable as either monopoly or Commission control.

The Commission has utterly failed to establish that there is monopoly or tendency to monopoly. They have affirmatively established that within the territory

covered by the activities of the companies whose cases are herein combined there is active and effective competition between these concerns and many lesser companies operating in the same territories. The Commission says that a certain percentage of the dealers are under what it calls "exclusive contract,"—though the contracts of course are not exclusive. It does not, however, show how many of these dealers came into being upon the initiative of the respondents. The business has greatly grown and the competition has greatly grown. In making one part of its argument the Commission forgot what it elsewhere develops—that the competition is so active in some communities as to exceed the public needs. And this suggests the essential considerations which are ignored by the Commission—that the competition is not in the acquisition of the business of the middle men, but in securing the patronage of the public. That which this company is undertaking to do is to get its product to the public with as little expense to itself as practicable. Sometimes and at some places it has found it advisable to make contracts with persons already in business. Sometimes it has found it advisable to undertake to sell to a dealer who has already established relations with another company. This relation is an embarrassment neither to the dealer nor the company. Each of them knows that if the dealer refuses to buy the company can find someone else already in business or willing to enter the business who will handle its products. The dealer secures the benefit of competition for himself by installing new "devices" or the public secures the benefit of the competition of a new dealer, who will install them.

Practically all of this company's business has been established in trade territory theretofore entered by its competitors. It has found trade relations already established between these competitors and the dealers

not easy to overcome. Other factors have presented quite as many difficulties as free pumps. The thought has not arisen, however, that either this "exclusive contract," or courteous treatment, or satisfactory form of credit, or a satisfied public constitutes unfair competition or bring about the evils of monopoly. It can even understand the attitude of some of the older and longer established concerns who are said by the Commission not to favor these "exclusive contracts," and who while having them would prefer to make sales of "devices." There is no good reason why they should not prefer the elimination of all methods by which new concerns establish themselves in competition with those already established. It is easy to understand, too, why those whose wholesale supply is precarious, whose selling organization is inefficient or whose capital is inadequate should call upon the Government for help in a competition with those who have undertaken to give stability and permanency to their business.

It is apparent that competition instead of being limited or suppressed has been greatly and effectively developed.

The respondent prays that the judgment setting aside the order of the Trade Commission be maintained.

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